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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1466

DAVID E. RAHMING,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF IN OPPOSITION

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DAVID E. RAHMING

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STATE OF FLORIDA

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION AT ISSUE

WHETHER FAILURE OF THE COURT-APPOINTED COUNSEL TO PRESENT ALL POSSIBLE ALIBI WITNESSES CONSTITUTES AUTOMATIC REVERSIBLE ERROR?

STATEMENT OF THE CASE

In addition to the State Circuit Court's seventeen page order denying Motion for Post-Conviction Relief after evidentiary hearing, the State would add that Mr. David Rahming was sentenced on September 27, 1971, to five years, five months and nineteen days for each of the two convictions for robbery and conspiracy to commit a robbery, the sentences to run concurrently.

PRETRIAL PREPARATION

Petitioner's pretrial facts are taken from the post trial order issued pursuant to the evidentiary hearing. The facts recited show that the public defender's office did contact the potential alibi witnesses prior to trial.

The evidentiary hearing disclosed that none of the persons contacted thought that they could be a helpful defense witness. (Appendix A-1 - A-2, Evidentiary Hearing Transcript at pages 309-310) None of the "alibi" witnesses in Alabama had seen David Rahming the day of the offense, with the exception of the hotel clerk. David Rahming's name was not on the hotel registry, but only that of his friend Richard Haddock.

EVIDENCE WHICH EXISTED BUT WASN'T UTILIZED BY DEFENSE COUNSEL

The State objects to Petitioner's statement that the public defender's

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investigator testified that he determined that David Rahming was in Alabama the day of the robbery. In fact, he testified that Mr. Rahming was in Alabama the day after the robbery. The robbery occurred as early as 10:00 p.m. on March 15, 1970, and Mr. Rahming was arrested near Mobile, Alabama, at 2:00 p.m. on March 16, 1970, for an unrelated offense.

REASONS FOR ALLOWANCE OF THE WRIT

There are no reasons for allowance of the Writ. Petitioner admits that the only issue is whether a trial court finding of inadequate preparation prior to trial requires automatic reversal. The Florida courts have held that it does not in this case. Federal law, also does not recognize fundamental error for mis-judgments of trial counsel.

This case does not present a total failure to investigate an alibi defense. Rather, the assistant Public defender exercised his judgment in deciding which witnesses and how many would be presented at trial. That judgment was not so ineffective as to deprive Mr. Rahming of a fundamentally fair trial. The defense called five witnesses at trial in addition to the Defendant himself. They testified that David Rahming left for Alabama with his friend during the week before the robbery, and that he called collect from the Alabama jail the day after the robbery. There is no indication before, during, or after trial that any Alabama witnesses could

have established more. Mr. Haddock's aunt, uncle and two daughters saw Mr. Rahming with their nephew. However, they did not see him on the day of the robbery, but the week before.

Federal case law also recognizes the difficulty in establishing standards of competence. The Fifth Circuit Court of Appeals chose to extend the fundamental fairness standard of the Fourteenth Amendment in considering its incorporation of the Sixth Amendment. Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1975) Yet, even then, the court en banc reversed its three-judge panel to uphold the conviction as obtained with effective counsel. The Circuit Court concluded in Fitzgerald that the right to effective assistance of counsel required a "gross-malfunction" of the criminal procedure, indicating that the "system has failed, and the State's consequent imprisonment or fine of the defendant is fundamentally wrong."

The "farce and mockery" standard for judging competency of counsel may or may not be still viable, (compare Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970) with the United States v. Holman, 436 F.2d 863, (9th Cir. 1970) cert. den. 402 U.S. 913), but the trial court's order denying relief after the evidentiary hearing is consistent with any standard of reviewing the fundamental fairness of the Petitioner's trial. Thus, in Scott v. United States, supra, the Court decided that the standard for ineffective assistance

of counsel is "whether gross incompetence blotted out the essence of a substantial defense." The circuit court judge's order in the Rahming case reveals that he did not feel that defense counsel was grossly incompetent. In the Scott case, the court noted that where a tactical decision of counsel was involved the appellate decision would not be overturned even though the federal court might have been inclined to decide it differently.

This Court had occassion to consider the issue of competency of counsel in a case dealing with coercion of a guilty plea. In McMann v. Richardson, 397 U.S. 759, 771 (1970), the Court said that false advice as to the admissibility of a confession which leads to a guilty plea does not render the confession inadmissible merely because the court retrospectively decided that the advice was right or wrong, but rather depends on whether the "advice was within the range of competence demanded of attorneys in criminal cases." The Court spoke of the demonstration of "gross error" required to find incompetence of a counsel who recommends a guilty plea when the defendant has made a prior confession.

It seems generally accepted that not every error in judgment deprives an accused of his constitutional right to a fair trial. See Holnagel v. Kropp, 426 F. 2d 777 (6th Cir. 1970), cert. den. 400 U.S. 867. In light of the two eye-witnesses who positively identified Mr. David Rahming as

the robber, the failure to procure for trial the "alibi" eyewitnesses did not deprive him of a fair trial nor constitute gross incompetence on the part of the defense counsel.

WHEREFORE, the decisions of the State courts should be affirmed and the Petition for Certiorari should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondent in Opposition has been furnished this 20th day of August, 1975, to Honorable Larry Klein, Cone, Wagner, Nugent, Johnson & McKeown, 507 North Olive Avenue, West Palm Beach, Florida 33402.

Resepctfully submitted,

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APPENDIX

CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA - CRIMINAL DIVISION

CASE NO. 70C-441

STATE OF FLORIDA,

V.

DAVID E. RAHMING

EXCERPT OF EVIDENTIARY HEARING TESTIMONY OF DEFENSE ATTORNEY

A The reason I didn't subpoena the hotel records; I made the decision and I told McCray that I am not going to subpoena the records in here for Mr. Hurley to get up and tell the jury that Rick Haddock didn't commit the robbery because his name is on the record and David Rahming's name is not on there, and it is not on there because he was in West Palm Beach that night. I wasn't going to bring that in at all.

Bernice Gayle and her husband and other people wouldn't give me anything definite to go on except they would scramble the case for the prosecutor. I decided I didn't want them on the stand, not wanting to be here bodily and not knowing dates and for Mr. Hurley to break them down and say that they didn't prove anything,

and not having any more things to prove the case, even though it is not the requirement of the law, so I said that I am not going to put those people on the stand.

Had I decided they would help me, I would have gone to the Court and said, "You will have to give us a couple days or as long as it takes to get these people in and let the jury hear what they have to say."

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